



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 383 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**YVONNE ACHITSA ODEDERE ..... CLAIMANT**

**-Versus-**

**MASENO UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent vide letter of appointment dated 29<sup>th</sup> April 2014 as Council Affairs Officer Grade 12. The appointment was on permanent and pensionable terms subject to successful completion of a probationary period of one year. She reported for work on 16<sup>th</sup> June 2014 and the probation period was to end on 15<sup>th</sup> May 2015.

The Claimant was the first holder of the position which is established in the University Statutes which also sets out the functions of the office. According to the letter of appointment the Claimant was to report to the Registrar Administration for assignment of duties. In view of the nature of her duties the Claimant worked directly under the Vice Chancellor who was the secretary to the Council. At the time the Vice Chancellor was Professor Dominic Makawiti.

The Claimant proceeded on maternity leave of 90 days on 18<sup>th</sup> January 2015 and reported back to work on 20<sup>th</sup> April 2015. On 26<sup>th</sup> June 2015 the Claimant received a letter extending her probationary employment by 4 months with effect from 15<sup>th</sup> May 2015 and on 8<sup>th</sup> September 2015 she received a letter of termination of employment. The reason for termination as stated in the letter is ***“because your performance has been found to be below expectation”***. Both the letter extending her probation and the letter of termination were signed by Prof. Catherine A. Muhoma, Deputy Vice-Chancellor, Finance & Development. The Claimant was aggrieved by the termination and appealed to the Chairman but she did not receive any response to her appeal.

It is the Claimant’s contention that the termination of her employment was in breach of her rights under the Respondent’ policies and procedures as she had not been issued with any warning or other indication that her performance was wanting. She was also never given a hearing before termination. The Claimant contends that the termination was malicious, discriminatory and unfair. She prays for the following remedies-

- (a) A declaration that the Claimant’s termination of employment on account of her pregnancy amounted to a violation of her rights under Section 5(3) of the Employment Act 2007 and Articles 27(5) and Article 41 (1) of the Constitution;

- (b) A declaration that the Claimant's termination was in violation of Sections 45 and 46(a) of the Employment Act and therefore unfair.
- (c) A declaration that the termination was in breach of the Claimant's contract of employment.
- (d) An order directing that the Respondent unconditionally reinstate the Claimant to their employment services and to her former position without any loss of benefits.
- (e) An order that the Claimant be adequately compensated for the time lost out employment.
- (f) In the alternative to prayer (d) & (e) and without any prejudice to the foregoing, the Respondent be ordered to fully compensate the Claimant for unfair, unlawful and wrongful termination of the employment services of the Claimant being 12 months salary – Kshs.1,785,036.00.
- (g) An order directing the Respondent to pay the Claimant her salary for days worked in September 2015 – Kshs.74,376.50.
- (h) An order directing the Claimant be paid her 35 pending leave days – Kshs.260,317.75.
- (i) An order directing that the Claimant be paid 6 months pay in lieu of notice – Kshs.892,518.00.
- (j) An order directing the Claimant be paid all her terminal dues, including pension and other allowances such as passage & baggage.
- (k) An order directing the Claimant be issued with a Certificate of Service.
- (l) General damages for discrimination on account of pregnancy and subjecting the Claimant to mental torture.
- (m) Awards in addition to the above to be determined by Court.
- (n) Costs of this Claim.
- (o) Interest on prayers f, g, h, I, j and I until payment in full.

The Respondent filed a Response to the Claim in which it denies the allegations in the Memorandum of Claim and avers that at the time of termination the Claimant was under probation which had been extended at her request on the basis that she had only served her probationary period for 8 months.

The case was heard on 8<sup>th</sup> December 2016 when the Claimant's evidence was taken and on 13<sup>th</sup> March 2017 was the defence case was heard. Each party called one witness. The Claimant testified on her behalf while the Respondent called GRACE MUMBI NDUNGU, its Senior Assistant Registrar, Human Resource Directorate. The parties thereafter filed and exchanged written submissions. The Claimant was represented by Otieno Willis instructed by Otieno Ogola & Co Advocates while the Respondent was represented by Mrs. Onyango instructed by Otieno Ragot & Co. Advocates.

In the written submissions filed on behalf of the Claimant it is urged that the Claimant was discriminated because of her pregnancy, subjected to unfair labour practices, that her right to fair administrative action was violated and that she is entitled to the prayers sought in the Claim. The Claimant relied on the cases of ***GVM v Bank of Africa Kenya Limited; George Onyango Akuti v G4S Security Services Kenya Ltd; and David Wanjau Muhoro v Ol Pajeta Ranching Limited.***

For the Respondent it was submitted that the Claimant was not pregnant at the time of termination of her employment and that she was on probation after the probation was extended following assessment that found her performance wanting. The Respondent submits that the Claimant was not discriminated or victimised on grounds of her pregnancy as she alleges. It is submitted that the Claimant was given

termination notice of 7 days as provided in section 42 of the Employment Act as she was still on probation.

## **Findings and Determination**

I have considered the pleadings, the viva voce evidence and written submissions filed by the parties. I have also considered the authorities cited by the Claimant. The issues arising for determination are in my opinion the following-

1. Whether the Claimant was on probation at the time of termination of her employment;
2. Whether the Claimant was discriminated;
3. Whether the Claimant was subjected to unfair labour practice;
4. Whether the termination of the Claimant's employment was unfair;
5. Whether the Claimant is entitled to the remedies sought.

### **1. Whether the Claimant was on probation at the time of termination of her employment**

The Claimant's letter of appointment provides for probation of one year. Under the Terms of Service for Non-Teaching Staff of Maseno University the probation period for grades 11 to 14 is one year. The Claimant was in Grade 12. There is no provision for extension of that probation period under the Terms of Service for Non-Teaching Staff of Maseno University. According to the terms, during the probation period notice for termination by either party is one month.

Under section 42 of the Employment Act maximum probation period is six months which may be extended for a further period of a maximum of 12 months.

It was pleaded and again submitted for the Respondent that the Claimant requested for extension of her probationary period, which the Claimant denied. The Respondent did not produce any evidence to support that contention. The Respondent's witness did not state in her evidence that the Claimant requested for her probationary period to be extended. The witness stated that the probation period was extended but the Claimant did not complain.

Section 26 of the Employment Act provides that the terms in the Act are minimum terms and no employee can be engaged on less favourable terms. This means that the provisions for probationary period in the Respondent's Terms of Service for Non-Teaching Staff is unlawful in so far as it provides for probationary period that is longer than six months.

Section 26 is self-acting and provides that where an employer's terms are less favourable than what is provided for in the Act the provisions of the Act will apply. It provides that-

#### ***26. Basic minimum conditions of employment***

*(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.*

*(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.*

Probationary period does not stop running when an employee is on maternity leave as that would

constitute discrimination on maternity grounds which is prohibited by section 5 of the Employment Act. Section 5(3) provides that-

*(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—*

*(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*

*(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

*(4)...*

*(5) ....*

*(6) ....*

*(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden*

Besides the foregoing, the letter extending the Claimant's probation period did not state why it was extended. It does not state it was extended due to the Claimant's performance being below expectation as alleged in the letter of termination. Probation period is supposed to be extended only if there is proof of performance below expectation, and it has been determined that with the extension the employee will be able to perform to expectation. The letter extending the Claimant's probation period did not assign any reasons for the extension. It did not refer to any assessment or observations by the Claimant's supervisor that required the probation period to be extended or point out the shortcomings that the Claimant was supposed to improve on during the period of extended probation.

Further, the extension was done after the probation period had lapsed. It was done outside the probation period when the Claimant ought to have been confirmed. The extension is further on a memo and not a letter. It is dated 26<sup>th</sup> June 2015 when the Claimant's probation period lapsed on 15<sup>th</sup> May 2015, but stated that it will be effective from 15<sup>th</sup> May 2015, the date on which the probation period ended.

Since there is no provision in law for extension of probation beyond one year I find that the Claimant's probation had lapsed by the time she was terminated on 8<sup>th</sup> September 2015 and that the extension of her probation having been unlawful and effected after the lapse of probation period, was null and void.

## **2. Whether the Claimant was discriminated**

Having found that there was no valid reason for the extension of the Claimant's probationary period either in law or in the Respondents terms and conditions of service applicable to the Claimant, the only logical explanation for the probation is that it was intended to cover the period when the Claimant was on maternity leave. This according to section 5(3) is discrimination on grounds of pregnancy. Indeed, the Respondent alluded to the extension having been because the Claimant only served 8 months of probation, and alluded that the extension was on the request of the Claimant, a matter that I have stated above has been denied by the Claimant and no evidence was produced to prove. I therefore find that the Claimant was discriminated by extension of her probation period on grounds of pregnancy.

### **3. Whether the Claimant was subjected to unfair labour practice**

Unfair labour practice is not defined in Kenyan law. The general understanding of unfair labour practice is that it refers to any unfair act or omission by an employer against an employee and includes any act that is against the law.

Discrimination would therefore be categorised as an unfair labour practice. Unfair labour practice is however such a fluid term that would not in itself stand alone as a claim. An employee must specify the act that constitutes unfair labour practice to be able to justify it in a claim. It would thus be unwise for a court to make a specific finding of unfair labour practice unless it is in relation to a specific act that constitutes unfair labour practice. In the present case the failure to give the Claimant a hearing would justly be classified as unfair labour practice; so would the failure to give her notice or to extend her probation period and practically any other act or omission by an employer that would lead to a finding of unfair termination.

I therefor find that the Respondent subjected the Claimant to unfair labour practice.

### **4. Whether the termination of the Claimant's employment was unfair**

The Claimant's employment was terminated without giving her a hearing. She was informed of the reasons for termination in the very letter that terminated her employment. The Respondent's witness testified that the Claimant was not put on a performance appraisal system or any form of assessment before termination.

Section 41 of the Employments Act provides that before an employee is terminated on grounds of performance the employee must be given a hearing.

#### ***41. Notification and hearing before termination on grounds of misconduct***

*(1) Subject to section 42(1), an employer shall, before terminating the*

*employment of an employee, on the grounds of misconduct, **poor performance** or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or **poor performance**, and the person, if any, chosen by the employee within subsection (1), make.*

Having not given the Claimant a hearing the termination of her employment was unfair. The termination was also unfair because she was not given notice of one month as provided in the Respondent's Terms of Service for Non-Teaching Staff.

For these reasons the termination was unfair.

### **5. Whether the Claimants are entitled to the remedies sought**

The Claimant prayed for what I would term as a plethora of remedies. Most of them are duplicated. In the opinion of the court the remedies can be summarised into the following heads:

1. A declaration that the termination of the Claimant's employment violated her rights under Articles 27(5) and 41 of the Constitution and sections 5(3), 45 and 46(a) of the Employment Act;
2. An order for unconditional reinstatement to the former position without loss of benefits;

3. In the alternative to prayer 2 above an order for compensation for unfair or unlawful termination;
4. General damages for discrimination;
5. Payment of terminal dues including-
  - a. Salary for days worked
  - b. Pay in lieu of notice
  - c. Pending leave days
  - d. Pension
  - e. Buggage /passage
  - f. Certificate of service
6. Costs
7. Interest

I will therefore consider the remedies under these heads. I have already found above that the termination of the Claimant's employment was unfair and for violation of the Employment Act.

### **Reinstatement**

The remedy of reinstatement is only available to an employee under exceptional circumstances. Section 49(4) and especially the wishes of the employee, the practicability of recommending reinstatement and re-engagement and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

During her examination in chief the Claimant was categorical that what she wants is damages for the months she worked and for the loss of her employment. She did not express the wish to be reinstated.

For these reasons I decline to grant the Claimant the remedy of reinstatement.

### **Compensation and general damages**

I will consider these heads together for reasons that the intend to give one global figure to cover the two heads.

The Claimant prayed for both compensation for loss of employment and general damages for discrimination. Having found that the termination of her employment was unfair, she is entitled to compensation under section 49(1)(c). the Claimant is further entitled to damages for discrimination having found that she was discriminated on grounds of pregnancy.

In awarding compensation the court is required to consider several factors among them length of service so that an employee who has served for a relatively shor period would qualify for less compensation than one who has served a longer period.

In the present case the Claimant had served for just over a year. However for the reason that she was discriminated I award her full compensation of 12 months' salary taking into account both the unfair termination and the discrimination.

### **Terminal Dues**

The Claimant is entitled to salary and benefits for 15 days worked in September 2015. She is also entitled to notice. Under the terms of service for non-teaching staff of the Respondent at Clause 21.2.1(a), she is entitled to 3 months' notice which I award her. The Claimant is further entitled to annual leave for the period of 15 months that she worked for the Respondent and passage/baggage of Kshs. 11745 as provided under the terms of service.

### **Pension**

The Claimant did not adduce evidence that she was a member of the Respondent's pension scheme. However if she was a member she would be entitled to benefits as provided under the scheme which evidence is not before this court. The Claim can be made directly to the pension scheme administrators and should there be any disagreement the same should be reported to the Retirement Benefits Authority which is the body mandated to deal with such disputes.

### **Certificate of service**

The Claimant is entitled to a certificate of service as provided in section 51 of the Employment Act and the Respondent is directed to issue the same to her within 30 days from date of this judgment.

### **Conclusion**

In conclusion, I declare that the Respondent discriminated against the Claimant on grounds of pregnancy and terminated the Claimant's employment unfairly and award the Claimant the following;

1. 12 months' gross salary as compensation
2. Salary for 15 days worked in September 2015
3. 3 months' salary in lieu of notice based on gross pay
4. 45 days' annual leave based on basic pay
5. Passage/baggage allowance Kshs. 11,745
6. The Respondent shall pay claimant's costs of this suit.

Since the Claimant did not submit a copy of her payslip the parties are directed to tabulate the amounts due and to either file a consent or submit a copy of payslip to the court for purposes of tabulation of the same within 7 days. The Claimant having admitted owing the Respondent's library an undisclosed sum arising from purchase of a laptop the Respondent is entitled to recover the said sum from monies due to the Claimant.

The decretal sum shall attract interest at court rates from date of final judgment should the same not be paid within 30 days from date of decree.

Orders accordingly.

**Dated Signed and Delivered this 19<sup>th</sup> day of October, 2017**

**MAUREEN ONYANGO**

**JUDGE**